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OECD Questionnaire and U.S. Responses on Four Issues Related to Corruption

Explanatory Note of the OECD Secretariat on Questionnaire

A Questionnaire Circulated by the OECD Working Group on Bribery in International Business Transactions

The attached note has been revised to take into consideration the discussion of the Working Group at its meeting on June 29 to July 1,1998. It contains in Annex 1 a questionnaire on how national laws would apply to a number of cases of undue payments.

Introduction

1. At is meetings on March 30 and April 1 and on June 29 to July 1, 1998, the Working Group on Bribery discussed ways to respond to the decision of the OECD Council that the CIME through its Working Group on Bribery shall examine on a priority basis the following issues with a view to reporting conclusions to the 1999 OECD Council meeting at Ministerial level:

— bribery acts in relation with foreign political parties;

— advantages promised or given to any person in anticipation of that person becoming a foreign public official;

— bribery of foreign public officials as a predicate offense for money laundering legislation;

— the role of foreign subsidiaries in bribery transactions;

— the role of offshore centres in bribery transactions.

2. The Chairman of the Group suggested that with respect to the first four issues the Secretariat

should propose a questionnaire to elicit information on whether current national laws and national laws

which would be adopted to implement the Convention, as well as any other relevant laws or measures

(administrative law, corporate governance standards), would cover a number of significant cases of undue payments that concern the Group. The delegation of France offered to submit a note on approaches to the role of offshore centres in bribery transactions, and this has since been issued as DAFFE/IME/BR(98)11.

3. The present note suggests a number of basic cases that are relevant to each of the four issues. A questionnaire is attached as Annexe 1. Delegates to the Working Group are requested to submit replies to the questionnaire to the Secretariat by **September 18, 1998** so that they may be part of the basis for discussion at the informal meeting of experts to be held on October 5–6,1998.

Foreign political parties and party officials

4. A number of delegates are concerned that important cases of undue offers or payments to foreign political parties or party officials which are part of a quid pro quo transaction to obtain the award of a specific business contract or improper business advantage from a foreign public official acting in relation to the performance of official duties, will fall outside the coverage of the Convention. (The Group would not be concerned with illegal party

or campaign financing intended only to develop a favourable relationship with public officials.)

5. The basic, direct bribery transaction concerning a foreign public official is one involving two actors: the briber and the recipient who is the public official who is induced to act or refrain from acting in relation to the performance of official duties. The Convention will cover offers or payments to political party officials when this is part of a direct 2-actor transaction between the briber and the foreign public official:

— when the party official is a public official or exercises a public function, including the case of a one-party state; or,

— when the transaction is between the briber and the public official and the political party is the beneficiary of the bribe transaction.

6. The quid pro quo transaction to obtain the award of a business contract or improper business advantage from a foreign public official can be more complex if there are three actors—the briber, the party official and the public official. If both the party official and the public official are involved with the offeror in the bribe contract, then it is a typical case of direct bribery with an intermediary. The bribe contract remains a contract between the briber and the public official. (However, if the party official is serving as an intermediary, but has not yet made the offer to the public official, then the crime has not been fully committed. It is only in the preparatory stage.)

7. A more interesting case is a typical situation involving political parties and party officials where two actors, the offeror/payer and the party official conclude the bribe contract; the party official promises to influence the public official to award the business or improper advantage. The third actor, the public official is not a direct participant in the illegal bargain, but provides the illegal quo. The public official is possibly unwitting, i.e., not aware of the bribe bargain, and consequently, merely the tool used by an outsider, the party official, who does not have the necessary qualification (public official) in order to deliver the illegal quo.

8. Participating countries might cover the case of a 3-actor transaction where the contract is between the offeror and the party official in a number of ways:

— The party official is considered to be an agent, intermediary or accomplice. The case is then covered by traditional concepts and by the Convention;

— The offer or payment to the party official might be covered by laws on trading in influence, party financing, or misuse of company funds.

9. The direct approach where the party or party official is equated to a public official, as in the US

Foreign Corrupt Practices Act (FCPA), might be seen as another alternative. The FCPA expressly criminalises (emphasis added),

"the use of the US mails or any means or instrumentality of US interstate and foreign commerce in furtherance of any offer, payment, promise to pay—or authorisation of any offer, payment or promise to pay—any money or thing of value to foreign government or political party officials or candidates for foreign political office for the purpose of influencing their acts or decisions or inducing them to use their influence to affect or influence any act or decision of a foreign government in order to assist in the obtaining or retaining business or directing of business to any person".

It would not, however, be necessary to isolate this case in legislation. Instead, one could ask whether the situation described in the FCPA—where a briber makes an offer or payment to a party official in order to influence a public official in the performance of his/her duty—would be covered by the application and interpretation of general provisions. In this situation, is the foreign political party official an intermediary, agent, or accomplice? Do other concepts apply, such as traffic in influence, party financing, misuse of company funds, conspiracy or one-party state?

Candidates

10. The case of offers or payments to a candidate for public office might be treated like the 3-actor situations described above where the second and third actor are the same person, acting at different moments in time. The offer/payer (actor 1) makes the bargain with the candidate (actor 2), who then changes status and becomes the public official (actor 3). Two variations might be considered:

1) The offer/promise is made before the election, and the payment is made before the election; the pro quo occurs later, after the election when the candidate is a public official.

2) The offer/promise is made before the election; the payment or part of it is made (or is meant to be made) later when the candidate is a public official; and the pro quo occurs later when the candidate is an official.

11. In variation 2, when a payment is made after the candidate has become an official, in fact, the full quid pro quo transaction has occurred with the public official. The payment is part of the quid and, in effect, repeats the offer/promise. The case is obviously covered by the Convention. On the other hand, if the payment is only meant to be made, but is not made**,** it will be more difficult to pursue the illegal bargain as an attempt to bribe. If the bribe transaction is interrupted because the candidate does not become an official this might be an "attempt": there is intent, but the object of the attempt does not achieve the quality (public official) to carry out the bargain. A similar situation might arise if the candidate becomes an official, but there is no post election payment for other reasons.

12. The first variation in paragraph 10 above, reflects a frequent real-life situation in which the offeror will make a significant campaign contribution. It is more difficult to cover and may be treated differently by countries participating in the Convention. Two ways to cover this case might be:

1) Candidates are equated to public officials in the law,

which is the case of the FCPA or Japanese criminal law in domestic cases.

2) The offer or promise to a candidate of undue advantage is treated as a preparatory act, an attempt or a conspiracy to bribe.

Bribery as a predicate offense for Money laundering

13. The Convention requires "national treatment" for money laundering: if bribery of a domestic

public official is a predicate offense for money laundering legislation, the bribery of a foreign public official should also be a predicate offense. A number of delegates expressed concern that this solution would lead to an imbalance in the application of the Convention, despite the general trend among countries to expand the list of predicate offenses.

14. A simple means to begin to assess eventual coverage of the Convention is to inquire of each participating country whether bribery of domestic public officials is a predicate offense for money laundering legislation. Is a bank officer who has reason to believe that a deposit to his bank is a bribe payment to a domestic official obliged to report the transaction to appropriate authorities? Would prosecutors have a basis for acting against the bank officer if he did not report the deposit to the appropriate authorities? In the foreign public official variation, is a bank officer who has reason to believe that a deposit is a bribe payment to a foreign official obliged to report the transaction to appropriate authorities? Does failure to report provide prosecutors with a basis for acting against the bank officer?

15. The fact that the proceeds of a bribe of a foreign official (profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery) will be subject to seizure as required by Article 3, paragraph 3 of the Convention, will increase incentives to hide proceeds in the financial system. A case would be where a company deposits or transfers the proceeds of a contract that was obtained by virtue of a bribe. Under money laundering legislation, would a bank officer who has reason to believe that the funds are the proceeds of a contract obtained by bribery of a domestic or foreign official be obliged to report the deposit to the appropriate authorities? Would prosecutors have a basis in money laundering legislation for acting against the bank officer if he did not report the deposit to the appropriate authorities?

Foreign Subsidiaries

16. The question of the role of foreign subsidiaries is essentially whether authorities in the country of the headquarters of the corporation can take action against officers of the company headquarters or the company if its foreign subsidiary bribes a foreign public official. The interesting case is where the authorities of the country where the company is headquartered can not take direct jurisdiction because the bribe takes place entirely outside the country of company headquarters and the officers of the subsidiary who are directly responsible are not nationals of the country of company headquarters. The relevant action could be taken by criminal prosecutors against officers of the company headquarters or against the company where the country applies the concept of corporate criminal liability. Action might also be taken by other authorities against officers of the company headquarters or the company. Actions by non-prosecutorial authorities will be especially interesting when a country does not apply the concept of corporate criminal liability.

What actions are possible when in the circumstances described above (the act occurs outside the home territory and is accomplished by non-nationals) the representative of the foreign subsidiary pays a bribe to a foreign public official and:

a) the company headquarters knows nothing about the bribe?

b) the company headquarters "should have known" about the bribe?

c) the company headquarters actually knows about the bribe?

d) the company headquarters authorised the bribe?

Annexe 1

United States Response to OECD Questionnaire Relating to Four Issues

Political parties and party officials

Case 1: A company officer approaches a political party or political party official and offers to pay or pays a substantial sum to the party, if the political party or party official promises that a public official will award a specific business contract or improper advantage to the company.

1.1.How would your national criminal or other laws treat this case if the contribution were to a national political party, with the purpose of obtaining a contract or advantage from your national government?

United States law covers payments to U.S. public officials or promises made to a public official to pay another person or entity, which would include the official's political party. *See* 18 United States Code (U.S.C.) § 201. The essence of a section 201 charge is a *quid pro quo* involving the public official, *i.e.*, the payment must be intended to influence an official act by the public official to induce the public official to assist in the commission of a fraud, or to induce the public official to do any act in violation his lawful duty. Section 201 is, therefore, somewhat narrower than the Foreign Corrupt Practices Act (FCPA), which covers payments made to foreign political parties and party officials to influence the political party or party official to take some action in their *party* capacity. *See* 15 U.S.C. §§

78dd-1(a)(2), 78dd-2(a)(2).

In Case 1.1, there is no indication that the public official is aware of the agreement between the company officer and the political party official. In such cases, it is highly unlikely that the government would bring a prosecution under section 201, although it might be possible to prosecute the matter as a conspiracy to commit mail or wire fraud with the object of defrauding the United States of the honest and faithful service of the public official. However, such a prosecution could only be brought if there was a clear corrupt intent on the part of the party official. If the agreement were simply to lobby a U.S. public official in exchange for a donation, such activity would not violate U.S. law.[1]

If the public official was aware of the conditions of the donation and agreed to them, *i.e.*, if the promise to make the donation was made directly to the public official or was communicated to the public official by the party official, then a prosecution under section 201 could be brought. Where the payment is made to a third party, such as the political party or party official, the recipient of the payment may be charged as a co-conspirator or aider and abetter. *See* 18 U.S.C. §§ 2, 371.

In addition, U.S. campaign finance laws might also be applicable to these facts.

1.2. How would your national laws that will implement the Convention treat this case if it involved a foreign political party and a foreign public official?

Possibilities might be: the party official is considered to be an agent, intermediary or accomplice; the offer or payment to the party official might be covered by laws on trading in influence, party financing, or misuse of company funds; the concept of a one-party state; or a direct approach where the party or party official is equated to a public official in the law. (See paragraphs 4-9 above.)

The FCPA specifically covers bribes to foreign political parties and party officials in exchange for their influence in the award or retention of business. Under the FCPA, political parties are directly covered, and a finding that the party or the party official was acting as the public official's agent, intermediary, or accomplice is not required, although that case would also be covered under sections 78dd-1(a)(3) and 78dd-2(a)(3).

Candidates for political office

Case 2: A company officer agrees with a candidate for public office to make a substantial campaign

contribution in return for the promise that the candidate will award the company a contract if the candidate wins the election and becomes a public official.

2.1. How would your national criminal or other laws treat this case if the contribution were to a candidate for a national public office?

Under the facts in Case 2, a prosecution could not be brought under section 201, which applies only to public officials or persons "selected to be a public official," which includes individuals already elected or appointed to office who had not yet assumed their duties but not candidates for public office. *See* 18 U.S.C. 201(a)(2). (Similarly, federal prosecution for bribery of state officials under the Hobbs Act and 18 U.S.C. § 1346 generally requires that the state official either have been elected or appointed to office.) Generally, for constitutional and public policy reasons, United States law does not strictly regulate the promises made by a candidate to potential supporters and donors. It is possible, however, in egregious cases, that facts such as those described in Case 2.1 could result in a prosecution for conspiracy to commit mail or wire fraud, that is to defraud the people of the United States of the honest and faithful service of their officials or for violation of the Federal Election Campaign Law, which is intended to prohibit corruption of candidates and the electoral process. At a minimum, the corporate officer and candidate for public office described in Case 2.1 could be prosecuted under 18 U.S.C. § 600 for the unlawful promise of a benefit in exchange for political activity, a misdemeanor.

2.2.How would your national laws that will implement the Convention treat this case if it involved a candidate for a foreign public office?

Possibilities might be that the candidate is equated to a public official in the law, or the offer or promise to a candidate of undue advantage is treated as a preparatory act, an attempt or a conspiracy to bribe, or that the case be covered by laws on the financing of political parties or election campaigns. (See paragraphs 10-12 above.)

The FCPA covers bribes to candidates of political parties (i) to obtain business from the party *and* (ii) for the party to assist in obtaining business from the government. There is no requirement that the business be awarded immediately, therefore, the prospective agreement described in Case 2 could be covered.

Because the FCPA covers candidates directly, there is no need to treat the bribe as a preparatory act, an attempt, or a conspiracy. Further, because the offer or payment constitutes the violation, the crime (or the authorization of a prospective offer or payment) is not dependent on the success of the candidate's candidacy.

Case 3: A company officer offers a candidate for public office a substantial campaign contribution immediately and another substantial payment once he/she has been elected, in return for the promise that the candidate will award the company a contract if the candidate wins the election and becomes a public official. The second payment—after the election—is not made.

3.1. How would your national criminal or other laws treat this case if the contribution were to a candidate for a national public office?

The first payment and the promise of a second payment would be covered only under the circumstances described in 2.1. The second payment or even merely a renewed offer or promise of payment, if made after the candidate was elected or took office, would violate section 201. Under section 201, the crime is complete upon the offer or

promise, regardless of whether the payment was made.

3.2. How would your national laws that will implement the Convention treat this case if it involved a candidate for a foreign public office?

The answer is the same as for 2.2. Once the authorization, offer or payment is made, whether the payment is made, whether the payment is actually made is irrelevant.

Bribery as a predicate offense for money laundering

Case 4: A deposit is made to a domestic bank. An officer of the bank has reason to believe that the deposit is a bribe payment to a domestic public official.

4.1. Under your money laundering legislation is the bank officer obliged to report such a deposit to appropriate authorities? Does the failure to report the transaction to the appropriate authorities give criminal prosecutors or other authorities a basis to take action against the bank officer?

U.S. law requires bank officers to report:

Transactions aggregating $5,000 or more when the bank "believes . . . that it was used to facilitate a criminal transaction, and the bank has a substantial basis for identifying a possible suspect or group of suspects."

Transactions aggregating $25,000 or more, regardless of whether the bank can identify suspects, "where the bank believes . . . that the bank was used to facilitate a criminal transaction, even though there is no substantial basis for identifying a possible suspect or group of suspects."

Any suspicious transaction or transactions aggregating more than $5,000 that involve potential money laundering "if the bank knows, suspects, or has reason to suspect that the transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities . . . as part of a plan to violate or evade any law or regulation or to avoid any transaction reporting requirement under Federal law. . . [or] where the transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction."[2]

It does not matter where the bribery occurred. The Money Laundering Control Act explicitly provides for nationality jurisdiction over U.S. nationals and, provided that some conduct occurred within the U.S., jurisdiction over non-U.S. nationals. *See* 19 U.S.C. 1956(f), 1961(1).

4.2. How would your national money laundering laws treat this case if the bank officer has reason to believe that the deposit is a bribe payment to a foreign public official?

The reporting requirement applies to violations of all U.S. laws. Thus, both bribery of domestic and foreign officials is covered. In addition, bribery of a foreign as well as of a domestic public official is a predicate offense to a charge of money laundering. *See* 18 U.S.C. 1956(c)(7)(D).

Case 5: A company's financial officer makes a deposit or transfer to a domestic bank of company assets received in payment of a contract with the national government. An officer of the bank has reason to believe that the funds are the proceeds of a contract obtained by bribery of a domestic public official.

5.1. Under your money laundering legislation is the bank officer obliged to report the transaction to appropriate authorities? Does the failure to report the transaction to the appropriate authorities give criminal prosecutors or other authorities a basis to take action against the bank officer?

Same answer as for 4.1. The issue here and in 4, above, is why the bank officer would think the transaction was suspicious.

5.2. How would your national money laundering laws treat this case if the bank officer has reason to believe that the funds are the proceeds of a contract obtained by bribery of a foreign public official?

Same answer as for 4.2.

Foreign subsidiaries

Case 6 The foreign subsidiary of a corporation with headquarters in your country bribes a foreign public official in order to obtain a contract. The bribery act occurs entirely outside your territory; the officers of the subsidiary who are directly responsible are not nationals of your country.

6.1. Under your national laws and/or rules that will implement the Convention, can your authorities take action in criminal or non-criminal proceedings against officers of the corporation headquarters or against the corporation headquarters itself:

a) if the company headquarters knows nothing about the bribe?

No, with respect to the anti-bribery provisions. However, regarding 6.1 (a-d), to the extent that the parent corporation controls 50 percent or more of the equity ownership of the subsidiary or consolidates its financial reports with those of the foreign subsidiary, it may be held liable under the books and records provisions of the FCPA. In the absence of active knowledge by the parent corporation, the Department of Justice would be unlikely to charge a criminal violation unless the parent had "consciously disregarded;" was "willfully blind;" or practiced "deliberate ignorance" with respect to the conduct of the affairs of the subsidiary.

b) if the company headquarters "should have known" about the bribe?

Under general principles of criminal liability, a parent corporation is not criminally responsible for the acts of a subsidiary company, except in cases where the parent has authorized, directed or controlled the subsidiary's actions.Under the FCPA, a person—whether a natural or a legal person—is criminally (and civilly) liable for the act of an agent when it has "knowledge" that its agent has

offered, promised or paid a bribe to a foreign government official. Knowledge is defined in the FCPA as including not only actual knowledge, but also "willful blindness" and "reckless disregard". In addition, under the current version of the FCPA, there must also be proof that the U.S. person, or its agent, used the U.S. mails or some means or instrumentality of interstate or international commerce in furtherance of the offer, promise or payment of a bribe. Under the proposed amendments to the FCPA, there will be no requirement of a nexus to the U.S. mails or an instrumentality of interstate commerce.

c) if the company headquarters actually knows about the bribe?

See 6.1(b), above.

d) if the company headquarters authorised the bribe?

Where a U.S. corporation authorizes, directs or participates in the payment of a bribe by one of its subsidiaries, it may be held liable for it. 18 U.S.C. §§ 78dd-1(a); 78dd-2(a).

6.2. Under your national laws and/or rules that will implement the Convention, can any of your authorities take action against the foreign subsidiary? What other circumstances are necessary?

Under proposed legislation to implement the Convention, it will be unlawful for a subsidiary of a U.S. firm (or any other foreign-incorporated legal person), to take any actions while in the territory of the United States, in furtherance of an offer, payment, promise to pay or authorization of a bribe to a foreign official or to a foreign political party, party official or candidate for foreign political office.

Under proposed amendments to the FCPA to implement the Convention, it will be unlawful for any U.S. person who is an officer, director, employee, agent or stockholder acting on behalf of the foreign subsidiary, while outside the territory of the United States, to take any actions in furtherance of an offer, payment, promise to pay, or authorization of a bribe to a foreign official or to a foreign political party, party official, or candidate for foreign political office.

Notes.

[1] Some state laws, however, may impose a duty of fidelity upon employees, including political party officials, that would prohibit them from accepting any compensation from any person other than their employer, here the political party. In such states, the federal government may bring a prosecution based on the state law under the ITAR statute, 18 U.S.C. § 1952.

[2] *See* 12 Code of Federal Regulations (C.F.R.) § 21.11(c) (national banks); *see also* 12 C.F.R. § 208.20(c) (state banks); 12 C.F.R. § 208.62(c) (state banks); 12 C.F.R. § 563.180(d)(3) (savings associations); 31 C.F.R. § 103.21(c) (other banks). Bribery of a domestic public official is covered both directly and indirectly as a "criminal transaction" and a money laundering predicate. *See* 18 U.S.C. §1956(c)(7)(a) (incorporating 18 U.S.C. § 1961(1), which lists 18 U.S.C. § 201 as a predicate act). The law provides that the bank will not be liable in a civil action for making such a report. *See* 31 U.S.C. §5318 (g). The law further provides the failure to make such a report may subject the bank to civil enforcement actions by the appropriate supervisory agency. *See* 12 C.F.R. § 21.11(i) (national banks); *see also* 12 C.F.R. § 208.20(I) (state banks); 12 C.F.R. § 208.62(i) (state banks); 12 C.F.R. § 563.180(d)(10) (savings associations); 31 C.F.R. § 103.21(i) (other banks). However, there is no provision for criminal prosecution of the bank officer or the bank unless, of course, they are personally implicated in the underlying crime.